a

MALAYSIAN INTERNATIONAL MERCHANT BANKERS BHD.

v.

HIGHLAND CHOCOLATE AND CONFECTIONERY SDN. BHD. & ANOR.

b

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: 24-766 OF 1996]
8 NOVEMBER 1996

c

CIVIL PROCEDURE: *Proceedings - Mode of commencement - Action to interpret a debenture document - Averment of fraud in the alternative - Whether to begin by way of originating summons - Whether by way of writ - Non-compliance of rules of Court - Effect - Rules of the High Court 1980 O. 2 r. 1(3), O. 5 r. 2(b), O. 5 r. 4(1) & (2), O. 28*

d

The plaintiff had commenced an originating summons action against the defendants wherein it prayed for the proper interpretation of a certain debenture document. This principal issue aside, however, the plaintiff also averred fraud in the alternative. Before the learned Judge, a preliminary objection was raised
e by the second defendant to the effect that the action ought to have been proceeded by way of writ, and not by originating summons. The objection, apparently, was based on the wordings of O. 5 r. 2(b) Rules of the High Court 1980 (RHC), which stipulates that proceedings in which a claim made by the plaintiff is based on an allegation of fraud must be begun by writ.

f **Held:**

[1] There is a broad spectrum of discretion under the RHC, as well as under the inherent jurisdiction vested in the Court, to waive non-compliance with the rules, or to allow non-compliance to be corrected provided that no
g prejudice is likely to be caused.

[2] Order 2 r. 1 of the RHC provides that where at any stage of any proceedings there has been a failure to comply with the requirements of the rules, whether in respect of time, place, manner, form or content or in any other respect, that failure shall be treated as an irregularity and
h shall not nullify the proceedings. However, some kinds of irregularities may constitute such a fundamental defect in procedure that the Court simply may not exercise its discretion to disregard them.

[3] Fraud is not the sole issue in the present case and that being so it is not
i necessary for the plaintiff to proceed by way of a writ action. Bearing in

mind the provisions of O. 5 r. 2(b), and O. 5 rr. 4(1) & 4(2), the plaintiff is at liberty to proceed by way of an originating summons as the whole case hinges on the interpretation of a debenture document with an alternative averment in fraud.

[4] Since the plaintiff chooses to proceed by way of an originating summons, he must therefore forfeit his right to obtain judgment under O. 14 or O. 81 of the RHC and he can never proceed by way of a writ action.

[5] For this Court to resort to O. 28 r. 8(1) RHC all parties must file their affidavits. In this case the defendant has yet to file an affidavit in reply, and so no recourse can be had to O. 28.

[Preliminary objection dismissed]

Cases referred to:
Re 462 Green Lane, Ilford, Gooding v. Borland [1971] 1 All ER 315 ***(refd)***
Re Engall's Agreement [1953] 2 All ER 503; [1953] 1 WLR 977 ***(cit)***
Seah Choon Chye v. Saraswathy Devi [1971] 1 MLJ 112 ***(refd)***
E'singam v. Dr. Sundram & Ors. [1960] 26 MLJ 91 ***(refd)***
Yap Hong Thin & Anor. v. Seenevasam [1970] 1 MLJ 143 ***(refd)***
Re Deadman (deceased) Smith v. Garland and Others [1971] 2 All ER 101 CA ***(foll)***
Harkness v. Bell's Asbestos & Engineering Ltd. [1967] 2 QB 729 ***(dist)***
Nanyang Development (1966) Sendirian Berhad v. How Swee Poh [1969] 1 MLJ 232 ***(refd)***
Beh Lee Liang v. Chew Sah Suak @ Chew Sar San & Anor. [1996] 1 CLJ 173 ***(refd)***

Legislation referred to:
Control of Rent Act 1966, s. 16(1)
Rules of the High Court 1980, O. 2 r. 1(3), O. 5 rr. 2(b), 4(1), (2), O. 6 r. 7, O. 14, O. 28 r. 8(1), O. 81

For the plaintiff - Sowaran Singh; M/s. Abdul Raman Saad & Assoc.
For the second defendant - Azad Bashir Abdul Karem Bashir; M/s. Bashir & Co.

JUDGMENT

Abdul Malik Ishak J:

A preliminary objection is raised by Mr. Azad Basher bin Abdul Karem Bashir, the learned Counsel for the second defendant, to the effect that proceedings in which an alternative allegation of fraud is involved must be begun by writ and not by way of originating summons. Mr. Sowaran Singh, the learned Counsel for the plaintiff, argues to the contrary and he says that the procedure is perfectly in order and is not fatal to the continuance of the action.

Order 5 r. 2(b) of the Rules of the High Court 1980 ('RHC') provides (the relevant part material to this judgment) that proceedings in which a claim made

by the plaintiff is based on an allegation of fraud must be begun by writ. In *Re 462 Green Lane, Ilford Gooding v. Borland* [1971] 1 All ER 315, Ungoed-Thomas J had to deal with two pleas, first, of *non est factum* and, secondly, of fraud which proceeded by way of originating summons. The issue before his Lordship was whether proceedings involving alternative allegation of fraud should essentially be begun by writ or whether it may continue as though commenced by writ. This was what his Lordship said at p. 317 after referring to the case of *Re Engall's Agreement* [1953] 2 All ER 503; [1953] 1 WLR 977:

> In those circumstances, therefore, in this case there must be pleadings; there must be discovery; the action must be at least continued as though it had begun by writ. This is not a technicality; it is most important matter of substance because it is only by this means that the parties can see perfectly clearly what are the serious issues involved and be sure of having made available to them by discovery all the relevant documentary evidence which generally plays such an important part in these cases. Commencing the proceedings by writ would in the circumstances of this case involve only the very small additional expenditure of issuing the writ, and on the rules as they stand it seems to me that the requirement does exist that, whereas here there is an allegation of fraud, the proceedings must be so started and cannot be continued as though commenced by writ when in fact commenced by originating summons.

Seah Choon Chye v. Saraswathy Devi [1971] 1 MLJ 112, involved an application by way of originating motion for an order that a date be fixed by the Court within which an undertaking given by the respondent, a solicitor, to the applicant, can be completed. On these facts the Court had to deal with the crucial question of whether the application by way of originating motion was proper or whether it should be made by way of a writ. Syed Agil Barakbah J answered that crucial question in this way (at p. 114):

> However, the affidavits contain questions of facts which are disputed and involve allegations of fraud and implied misconduct not only against the respondent but against a third party. Where fraud is alleged it has long been the practice in countries where the English system of law operates for the Courts, in civil cases, to require proof of a high standard (per Azmi CJ (as he then was) in *Ratna Amal v. Tan Chow Soo* [1967] 1 MLJ 296 quoting Rose CJ in *Nederkandsche Handel-Maat-schappij N.V. (Netherlands Trading Society) v. Koh Kim Guan* [1959] MLJ 173, 175. It follows therefore that parol evidence becomes necessary.

In *E'singam v. Dr. Sundram & Ors.* [1960] 26 MLJ 91, Adams J was faced with an application by way of interlocutory injunction, *inter alia*, to declare that the annual general meeting of the Football Association of Selangor was *ultra vires* the rules of the association and therefore void and of no effect. In a short judgment his Lordship said this:

> The granting of interlocutory injunctions is provided for under O. 50 r. 6 of the Rules of the Supreme Court. It is quite impossible to have an interlocutory injunction unless there is a suit pending nor is it possible for the Court to decide the other issues in the notice of the motion.
>
> The relief that the applicant is asking for in these proceedings can only be decided after the calling of evidence to establish whether or not the annual general meeting was lawfully constituted and whether or not the election of the officers was in accordance with the constitution of the club. These are pure matters of fact.

Later, Adams J concluded in these words:

> What the applicant should have done in this case was to have taken out a writ and if he wished to ask for an interlocutory injunction to have served notice of motion asking for an interim injunction with the service of a writ. For the above reasons I decided that the procedure adopted in this matter was misconceived and I therefore dismissed the application with costs.

The question raised in the appeal before the old Federal Court in *Yap Hong Thin & Anor. v. Seenevasam* [1970] 1 MLJ 143 was whether an application for recovery of possession under s. 16(1) of the Control of Rent Act 1966 can be made by way of originating motion. The old Federal Court dismissed the appeal and upheld the decision of the trial Court by holding that where a person seeks an order of Court for possession of premises in the High Court he has to do so by writ of summons in an action.

These cases and many more which need not be discussed here singularly lay down a basic principle that where a gross irregularity exists the Court is not bound to condone it by granting costs to the defaulting party.

I have said elsewhere that the RHC has the force of law and it should not be ignored or overlooked. The observance of the RHC is therefore of considerable importance in litigation and it is the mark of a skilful and experienced lawyer to know how best to employ the rules for the practical and tactical advantage of his client. The general purpose of the rules as exemplified in the RHC is to assist the parties in achieving justice and they are not meant, as some lawyers thought, to be the mechanism for disciplining either the parties or their solicitors. There is a broad spectrum of discretion under the RHC, as well as under the inherent jurisdiction vested in the Court, to waive non-compliance with the rules, or to allow non-compliance to be corrected provided that no prejudice is likely to be caused. Order 2 r. 1 of the RHC, for instance, gives a generous discretion to the Court and this provision may usefully be prayed in aid to cure all manner of defects. But a word of caution need to be incorporated. It should be emphasised, lest lawyers take this judgment as a blanket approval to throw the RHC to the wind, that

O. 2 r. 1 of the RHC cannot be used to circumvent the express requirements of other rules found in the RHC. Some kinds of irregularities may constitute such a fundamental defect in procedure that the Court simply may well not exercise its discretion to disregard them; examples of these are abound, suffice for this exercise that one of them will be mentioned. Thus, failure to serve a writ within the period of 12 months from the date of issue, and the writ not having been renewed within that period of time is an example worth mentioning. Order 6 r. 7 of the RHC provides a compendious code in relation to the principles for the extension or renewal of writs. It would be futile on the plaintiff's part in such a case where he has forgotten or omitted to renew the writ, to try to evade O. 6 r. 7 of the RHC by resorting to the apparently open-minded wide discretion conferred to the Court under O. 2 r. 1 of the RHC.

With these broad principles in mind, I shall now proceed to answer the preliminary issue adverted in the early part of this judgment. Order 5 r. 4(1) of the RHC states that:

> Except in the case of proceedings which by these rules or by or under any written law are required to be begun by writ or originating summons or are required or authorised to be begun by originating motion or petition, proceedings may be begun either by writ or by originating summons as the plaintiff considers appropriate.

Rule 4(2) of O. 5 of the RHC states as follows:

> Proceedings –
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> (a) in which the sole or principal question at issue is or is likely to be, one of the construction of any written law or of any instrument made under any written law, or of any deed, will, contract or other document, or other-question of law; or
>
> (b) in which there is unlikely to be any substantial dispute of fact,
>
> are appropriate to be begun by originating summons unless the plaintiff intends in those proceedings to apply for judgment under O. 14 or O. 81 or for any other reason considers the proceedings more appropraite to be begun by writ.

Mr. Sowaran Singh says that the plaintiff has the right to proceed by way of originating summons as the sole or principal issue at hand revolves on the interpretation of a debenture document and the plaintiff do not intend to apply for judgment under O. 14 or O. 18 of the RHC nor to proceed by way of a writ. Mr. Sowaran Singh further says that the mode which he prefers to proceed under is a wholesome mode as expediency is foremost in his mind. To proceed by way of a writ, so says Mr. Sowaran Singh, would entail delay which would not do justice to the plaintiff. It seems to me that these

submissions were grounded on O. 5 r. 4(1) and r. 4(2) of the RHC and there is merit in it. As I said earlier an action, "in which a claim made by the plaintiff is based on an allegation of fraud" must be begun by writ: Order 5 r. 2(b) of the RHC. Here the action is not solely based on fraud. Fraud is only raised in the affidavit of Nordin Abdullah that was affirmed on 28 October 1996 as an alternative and this is clearly seen at para. 9 thereof:

> Secara alternatifnya, pihak plaintiff juga mengatakan bahawa penjualan harta tersebut oleh pihak defendan pertama kepada defendan kedua telah dilakukan secara fraud dan butir-butirnya adalah seperti yang terkandung di perenggan lima (5), enam (6) dan tujuh (7) di atas.

Nordin Abdullah in the same affidavit adverted to the debenture documents in paras. 3, 4, 5, 6, 7, 8, 10, 11 and 12.

It is interesting to note that in *Re Deadman (deceased) Smith v. Garland and Others* [1971] 2 All ER 101 CA, Stamp J considered *Re 462 Green Lane, Ilford, Gooding v. Borland (supra)* in a different light. This was what Stamp J said:

> I have been a little troubled by the judgment delivered in *Re 462 Green Lane, Ilford, Gooding v. Borland.* There the action had been begun by originating summons and did unquestionably contain allegations of fraud on which an alternative claim for relief was based. The learned Judge on the procedural point held that the action ought to be brought by writ, that the matter was not a technicality, and he appears to have stayed the proceedings. Unfortunately, it does not appear to have been brought to the learned judges's attention that RSC O. 2 r. 1(3) provides as follows:
>
> > The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed.
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> The existence of this r. 1(3) does, I think, assist me to come to the conclusion that the inclusion now of a claim which would have required the action to have been brought by writ is not fatal to the continuance of the action. To some extent this has led me to come to the conclusion which I have expressed.

I subscribe fully to what Stamp J said in *Re Deadman (deceased) (supra).* Incidentally, it is pertinent to note that our O. 2 r. 1(3) of the RHC is an exact replica, word for word with their English counterpart as reproduced earlier. Order 2 r. 1 of the RHC, in essence, provides that where at any stage of any proceedings there has been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, that failure shall be treated as an irregularity and shall not nullify the proceedings. There used to be a distinction between a non-

compliance such as rendered the proceedings a nullity (where the Court has to treat the non-compliance as a nullity and set them aside) and a non-compliance which merely rendered the proceedings as irregular (where it is valid and the Court has a discretion to make the appropriate order according to the circumstances). This distinction no longer holds water in view of the present wording of O. 2 r. 1 of the RHC and, consequently, all those English cases that sought to bring out the distinction as explained above must be disregarded totally: see for instance *Harkness v. Bell's Asbestos & Engineering Ltd.* [1967] 2 QB 729 CA at p. 735 CA. I am particularly attracted by the decision of Raja Azlan Shah J (as His Majesty then was) in *Nanyang Development (1966) Sendirian Berhad v. How Swee Poh* [1969] 1 MLJ 232 where his Lordship held the view that where an Act of Parliament does not specify in what form an application may be made to the Court, the application may as a matter of procedure be made in any form in which the Court can be moved and therefore the procedure by originating motion in that case was held to be correct.

Azad Bashir bin Abdul Karem Bashir agrees that he has yet to file an affidavit in reply to that of the affidavit of Nordin Abdullah and this meant that encl. 12 is standing alone in the file without any reply. This defect affects the application of O. 28 r. 8(1) of the RHC as suggested by Mr. Sowaran Singh because I cannot order this case begun by originating summons to continue to proceed as if the cause or matter had been begun by writ by ordering, **"that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof."** I had occasion to ventilate my view in regard to O. 28 r. 8(1) of RHC in the case of *Beh Lee Liang v. Chew Sah Suak @ Chew Sar San & Anor.* [1996] 1 CLJ 173 in the following terms:

> On the strength of O. 28 r. 8(1) of the RHC, I ordered that these two cases commenced by originating summonses be continued as if begun by writ and I too ordered that all affidavits filed therein for these two cases (Encls. 2 (filed in support of Encl. 3), 12, 15 and 24 in Originating Summons No: 24-88-94 (T)) and (Encls. 3 (filed in support of Encl. 2), 11, 13 and 16 in Originating Summons No: 24-89-94 (T)) to stand as pleadings. An early trial to enable witnesses to be called and be cross-examined was also ordered by me.

For the foregoing reasons, it is my judgment that:

(a) fraud is not the sole issue in the present case and that being so it is not necessary for the plaintiff to proceed by way of a writ action;

(b) the plaintiff is at liberty to proceed by way of an originating summons as the whole case hinges on the interpretation of a debenture document with an alternative averment in fraud;

(c) for this Court to resort to O. 28 r. 8(1) of the RHC all the parties must file their affidavits; and

(d) since the plaintiff chooses to proceed by way of an originating summons, he must therefore forfeit his right to obtain judgment under O. 14 or O. 81 of the RHC and he can never proceed by way of a writ action.

The upshot of it all is this: The preliminary objection is dismissed with costs. The second defendant is allowed to file an affidavit in reply to counter the affidavit of Nordin Abdullah.

Reported by W.A. Sharif